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Adequate Procedures – Attorney General Provides Draft Guidance on How Australian Companies Should Prepare for the New Absolute Liability Foreign Bribery Offence

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Background

As discussed in our client alert in March, the *Crimes Legislation Amendment (Combatting Foreign Bribery) Act 2024* passed through Parliament in February 2024 and introduced a new corporate offence into the Commonwealth Criminal Code for a failure to prevent foreign bribery, based on an equivalent offence in the UK's *Bribery Act 2010* (*Bribery Act*). The offence will apply where an associate of a corporation has committed bribery for the profit or gain of the corporation. A corporation will not be liable under the "failure to prevent" offence if it can prove it had "adequate procedures" in place to prevent its associates from committing foreign bribery.

The legislation requires the attorney general to provide guidance to Australian companies (and foreign companies with operations in Australia) on the steps that can be taken to establish adequate procedures to prevent foreign bribery. The guidance has now been released in draft form, and it outlines the fundamental concepts to consider when implementing an anti-bribery compliance program. In preparing the guidance, the attorney general has considered the UK government's guidance that accompanies its failure to prevent offence in the *Bribery Act*, as well as the guidance published by Transparency International UK, designed to assist corporations with their compliance with the *Bribery Act*.

The attorney general has opened a public consultation on the draft guidance seeking submissions from interested stakeholders to ensure the Australian guidance is fit for purpose. With the honeymoon period coming to an end in the second half of 2024, Australian companies with operations offshore, and foreign companies operating in Australia, have a relatively short period of time to implement adequate procedures.

Draft Guidance

The guidance makes very clear that it is not to be used as a "checkbox" approach, and the mere existence of anti-bribery controls will not be sufficient for a company to rely on the adequate procedures defence. The document is designed to assist companies in ensuring that their anti-bribery compliance program is adequate, based on the key principle that the obligation to implement controls will be proportionate to the circumstances of the company, including the scale and location of the company's activities and the nature and level of the risks identified through a robust risk assessment.

The Attorney General's Department has acknowledged the conceptual difficulty with the adequate procedures defence insofar as a company seeking to rely on the defence has, *ipso facto*, failed to prevent the occurrence of foreign bribery.

The guidance provides that a single event of bribery does not necessarily mean that the company's bribery prevention controls were inadequate; it will depend on the circumstances of each case, including whether the controls were effective and proportionate to the risks posed.

Proportionality and Effectiveness

Companies with operations offshore must consider the nature and extent of any foreign bribery risk and have the assessment overseen by senior management. Resourcing for anti-bribery compliance should reflect the scale of the company's operations and the risks it faces. For large corporations with multiple business units and tiered management structures, more sophisticated controls may be needed to connect the compliance function with senior management.

The principle of effectiveness will require evidence of a robust culture of integrity, including leaders who actively examine foreign bribery risks and "use both words and actions" to encourage compliance. The compliance function must be adequately resourced to perform its work and should report directly and regularly to senior management.

Responsibility of Top-level Management

Senior management will be expected to demonstrate leadership in developing and implementing anti-bribery measures and should ideally select themselves to lead the company's anti-bribery initiatives. Communication is key, emphasising that compliance with the anti-bribery program is the responsibility of all employees and agents.

Risk Assessment

The risk assessment sits at the heart of adequate procedures. Companies will need to assess and rate the risks, and comprehensively document the process and findings. The factors to be considered in the risk assessment include the countries the company operates in, periodic transactions involving foreign public officials, and the financial controls the company has in place. If a company identifies that it operates in high-risk jurisdictions, wins contracts in state-run economies or frequently deals with foreign public officials, more comprehensive controls will be needed to satisfy the adequate procedures obligation. As always, the use of foreign agents can be a red flag, together with vaguely described services and deliverables, payments to personal accounts and large commissions. Any risk assessment should include consultation with the employees on the front line of procurement, who will have the best insights into existing practice, risks and deficiencies.

Due Diligence

Companies will need to research, investigate and assess all existing and proposed business relationships. Associates that provide services to the company that are not controlled by it – so called "non-controlled associates" – are still able to commit foreign bribery for the financial gain of the company and therefore must be subject to the company's due diligence process.

Part of that due diligence process will require an assessment as to whether the risk presented by a non-controlled associate can be sufficiently mitigated, or if appropriate control measures can be implemented; for example, participation in anti-bribery training and a documented commitment by the third party to the company's anti-bribery compliance program. Interestingly, the guidance provides that companies are not expected to verify the full implementation of anti-bribery measures by non-controlled associates but should be satisfied on a reasonable basis that they are complying. The guidance is currently silent on how a company might strike the balance between not verifying a non-controlled associate's compliance with the anti-bribery measures while achieving satisfaction on a reasonable basis that there is compliance.

Communication and Training

Training should be responsive to the risks identified in the company's risk assessment process and should be provided to the full spectrum of officers and employees, including directors. The training should be sector specific and tailored to those employees working in the higher risk functions such as purchasing and contracting. Training should always include case studies and real-life scenarios and should be periodically reviewed to ensure it addresses contemporary bribery risks.

The guidance indicates that simply asking employees to confirm that they have read and understood the anti-bribery compliance program will be inadequate. There must be opportunities for employees to engage with the process; for example, through focus groups, online training and meetings. The training should focus on developing practical skills and knowledge to resist bribe demands and to detect bribery risks. These materials should also be provided to and accessible by non-controlled associates.

Self-reporting

A self-report is not necessary to rely on the adequate procedures defence; however, the draft guidance indicates that the commonwealth director of public prosecutions will consider a self-report when determining whether a prosecution is in the public interest. This may provide little comfort to Australian companies when the most recent corporate prosecution for foreign bribery in Australia, which the prosecution took to the High Court to ensure the highest possible penalty, was the result of a self-report that was described by the judge at first instance as comprehensive and best practice.

Monitoring and Review

A company should constantly monitor its anti-bribery compliance program, with periodic reviews when entering new markets, changing activities or being exposed to new regulatory regimes. The guidance suggests that confidential and anonymous reporting channels are essential for monitoring the effectiveness of a compliance program, as are strict internal audit and financial control mechanisms to detect and deter foreign bribery activity. The guidance also suggests companies with a risk profile should seek external guidance on the adequacy of training for officers and employees.

Key Takeaways

The new absolute liability offence will come into force in September 2024, which leaves a comparatively short window for companies to ensure that they have implemented a sufficiently robust anti-bribery compliance program that would allow them to avail themselves of the adequate procedures defence.

A risk assessment will be the first step in understanding the level of controls and safeguards necessary to provide a proportionate response to the risks a particular company faces. The process and results should be comprehensively documented.

The principle of effectiveness will require evidence of a robust culture of integrity, including leaders who actively examine foreign bribery risks. The guidance indicates that simply asking employees to confirm that they have read and understood the anti-bribery compliance program will be inadequate; there must be opportunities for employees to engage with the process.

Training should be responsive to the risks identified in the company's risk assessment process and should be provided to the full spectrum of officers and employees, including directors.

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Our litigation team has a breadth of white-collar criminal defence experience that few firms in Australia can offer, including conducting independent investigations and acting for defendants in foreign bribery prosecutions, both at trial and appellate level. Our Australian team can also draw on global white-collar expertise, including from the UK, where a corporate strict liability offence and an adequate procedures defence was introduced more than a decade ago.

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